RECENT CASE NOTES

ADMINISTRATIVE LAW—POWER OF BOARD OF HEALTH TO LOCATE PESTHOUSES—CANNOT CREATE NUISANCE.—The owner of private property sought to enjoin the board of health from locating a pesthouse in a residential district, although the board under a city charter had discretion in its location. *Held,* that the injunction should be granted. *Birchard et al. v. Board of Health of City of Lansing et al.* (1918, Mich.) 169 N. W. 901.

This case illustrates the principle that apparently unlimited powers granted to administrative boards cannot be exercised to create private nuisances, unless the statute under which they act expressly so requires or unless the power is otherwise impossible of exercise. *Metropolitan Asylum Dist. v. Hill* (1881, H. L. Eng.) 6 A. C. 193, 212; *Mayor of Baltimore v. Fairfield Improvement Co.* (1898) 87 Md. 352, 39 Atl. 1081. Where the power can be exercised without creating a nuisance the discretion is limited to that extent. *Barth v. Christian Psychopathic Hospital Asso.* (1917) 196 Mich. 642, 163 N. W. 62. Had the pesthouse been in existence, a newcomer to the neighborhood could probably not have complained. See *Upjohn v. Board of Health of Richland Township* (1881) 46 Mich. 542, 9 N. W. 845. But how long it must have been in continuous operation before private persons are estopped from enjoining it as a nuisance does not appear to be settled. It will necessarily depend considerably upon the facts.

ALIEN ENEMY—DISABILITY TO SUE—PLEADING IN DEFENSE.—In an action by a person alleged to be an alien enemy the plaintiff's disability was not pleaded by the defendant, but was brought out in cross-examination only. *Held,* that the defense not having been pleaded as a part of the record, was inadmissible. *Heiler v. Goodman's Motor Express Van & Storage Co.* (1918, N. J. Ct. Err.) 105 Atl. 233.

While this ruling was *dictum* only, the point has but rarely come up in recent years. See COMMENTS, p. 680, *supra.*

ALIEN ENEMY—PARTNERSHIP—ACTION IN NAME OF FIRM WITH ONE ENEMY PARTNER NOT INHIBITED.—A partnership consisting of five British partners and one German, the latter domiciled in Germany, brought an action to recover a pre-war debt due the firm. The partnership having been dissolved by the war, the action was incidental to the effort of the British partners to get in the assets for purposes of liquidation. The defendant pleaded in abatement the alien character of one of the co-plaintiffs. *Held* (Lords Atkinson and Sumner *dissenting*) that the action should not be stayed. *Rodriques v. Speyer Brothers* (1918, H. L.) 119 L. T. Rep. 409.

See COMMENTS, p. 680, *supra.*

CONTRACTS — ILLEGALITY — CONFESSED JUDGMENT — EQUITABLE RELIEF. — The plaintiff, in consideration of the defendant's promise to procure a divorce, agreed to pay her a monthly sum, and to confess judgment for $35,000. as collateral security. The defendant secured the divorce, collected several payments, and then remarried. Further payments being refused, the defendant entered judgment on the confession and levied execution. The plaintiff sued, asking an injunction against proceedings on the execution, and further relief. *Held* (two judges *dissenting*) that the execution should be vacated and the defendant enjoined from enforcing the judgment. *Schley v. Andrews* (1919, N. Y.) 121 N. E. 812.

Contracts made in consideration of divorce fall among those held void as against public policy. *Pereira v. Pereira* (1909) 156 Cal. 1, 103 Pac. 488; *cf.* also (1915) 24 YALE LAW JOURNAL, 348. Where the parties are *in pari delicto* neither law nor equity will aid either, when the agreement has been wholly executed. *Platt v. Elias* (1906) 186 N. Y. 374, 79 N. E. 1. Nor, it seems, may property be recovered which has been transferred in part execution of the agreement. *Booker v. Wingo* (1888) 29 S. C. 116, 7 S. E. 49. And so far as the latter is wholly executory, the courts refuse all aid in its enforcement. See (1919) 28 YALE LAW JOURNAL, 502; (1917) 27 *ibid.* 273. Difficulty arises only where the execution or enforcement is still partial. Where judgment has been entered for one party to the illegal contract—at least where it was by confession, so that the other has not truly had his day in court—the judgment may be opened to permit defence. *Fields v. Brown* (1900) 188 Ill. 111, 58 N. E. 977; *Bredin's Appeal* (1879) 92 Pa. 241, 37 Am. Rep. 677. And there is authority for staying execution proceedings, as in the principal case. *Given's Appeal* (1888) 121 Pa. 260, 15 Atl. 468. To refuse such a stay would indirectly give judicial aid of a kind from which either wrong-doer may well be barred. And allowing an apparent obligor to take the initiative in equity by enjoining suit on a note, may be explained as in effect merely one form of defence. See *Booker v. Wingo, supra. Quaere:* Whether negotiation of such a note would be enjoined, or the note impounded and cancelled; such action would seem to overstep the general rule outlined above. But at least one court has gone far in aid of a wrong-doing obligor. A mortgage had been given, with power of sale; sale under the power was enjoined, as likely to create a cloud on title, and the mortgage was cancelled. *Basket v. Moss* (1894) 115 N. C. 448, 20 S. E. 733. As to recovery by the "dupe" against the "knave," though the transaction was illegal, see (1918) 27 YALE LAW JOURNAL, 1090; also (1915) 24 *ibid.* 255.

CRIMINAL LAW—CRIMINAL RESPONSIBILITY FOR ACT OF SERVANT.—The New York Labor Law (Consol. L. 1909, ch. 31, sec. 162) prohibited the employment of child labor. The penal statutes (Consol. L. 1909, ch. 40, sec. 1275) provided that violation of the Labor Law should be a crime punishable by *fine* for the first offense, which for second offense might be followed by *imprisonment.* The defendant, a corporation engaged in selling milk, was prosecuted for violation of the Labor Law by one of its servants, a wagon driver, who employed a boy to watch his bottles. The defendant had prohibited such hiring by its servants but had not adequately supervised the enforcement of its rules. *Held,* that the defendant was guilty, since the Labor Law imposed a non-delegable duty to suffer no violation of its provisions which could be prevented by reasonable regulation; and since, further, a duty to make reparation to the state for the wrongs of servants, when not carried beyond the payment of a moderate fine, is a reasonable regulation of the right to do business by proxy. *People v. Sheffield Farms—Slawson-Decker Co.* (1918, N. Y.) 121 N. E. 474.

It is the general rule that the master is not criminally liable for the acts of his servants unless committed by his command or with his assent. 26 *Cyc.* 1546. Quite frequently, however, statutes impose non-delegable duties upon the master or principal when public health, morals, etc., are involved, and supervision is difficult. *State v. Fagan* (1909) 24 Del. (1 Boyce) 45, 74 Atl. 693. The violation of such duties by a servant without the knowledge or even against the direct orders of the master may subject the master to criminal liability. *State v. Gilmore* (1908) 80 Vt. 514, 68 Atl. 658, 41 L. R. A. (N. S.) 786; 13 Ann. Cas. 324, note (sale of intoxicating liquor to a minor); *Tenement House, etc. v. McDevitt* (1915) 215 N. Y. 160, 109 N. E. 88, Ann. Cas. 1917A 455 (use of house by lessee, for prostitution); *Brown v. Foot* (1892, Q. B.)